Nos. 71-1016 and 71-1040

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U.S.
FILED
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No. 71-1016

FEDERAL POWER COMMISSION, *Petitioner,*
v.
LOUISIANA POWER & LIGHT COMPANY, *et al.*
(The Collateral Proceeding) *Respondents.*

FEDERAL POWER COMMISSION, *Petitioner,*
v.
LOUISIANA POWER & LIGHT COMPANY, *et al.*,
(The Curtailment Proceeding) *Respondents.*

No. 71-1040

UNITED GAS PIPE LINE CO. and PENNZOIL UNITED, INC., *Petitioners,*
v.
LOUISIANA POWER & LIGHT COMPANY, *Respondent.*

UNITED GAS PIPE LINE CO., *Petitioner,*
v.
LOUISIANA POWER & LIGHT COMPANY, *et al.*,
(FPC Opinion 606) *Respondents*

RESPONSE OF PIPELINE INTERVENORS IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI AND MOTION FOR EXPEDITED CONSIDERATION

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RESPONSE OF PIPELINE INTERVENORS IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI AND MOTION FOR EXPEDITED CONSIDERATION

Mississippi River Transmission Corporation, Natural Gas Pipe Line Company of America, Southern Natural Gas Company, Texas Eastern Transmission Corporation and Texas Gas Transmission Corporation

(Pipeline Intervenors) urge the Court to grant the petitions for writs of certiorari to the United States Court of Appeals for the Fifth Circuit which have been filed in the captioned proceedings by the Federal Power Commission and by United Gas Pipe Line Company, *et al.* The principal question presented by these petitions concerns the scope of the Commission's authority under the Natural Gas Act, 15 U.S.C. 717, *et seq.*, to regulate the curtailments of deliveries of gas to customers of an interstate pipeline, including its direct industrial customers, in order to effect an equitable allocation of gas among all of the pipeline's customers. We believe that the Court should give expedited consideration to this issue because "the present nationwide shortage of gas"[1] has already forced many interstate pipelines[2] to curtail deliveries to their customers pursuant to Commission authorization and many others[3] have filed curtailment plans with the Commission in anticipation of curtailments in the near future.

PIPELINE INTERVENORS' INTEREST AND STANDING IN THIS CASE

Pipeline Intervenors own and operate major natural gas transmission systems[4] through which gas is transported for ultimate distribution to millions of consumers in virtually every state east of the Mississippi

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[1] *Louisiana Power & Light Company* v. *United Gas Pipe Line Company, et al.*, FPC Pet. at p. 1a.

[2] See Appendix H to FPC Pet. at p. 93a.

[3] See Appendix I to FPC Pet. at p. 94a.

[4] The location of each of the pipeline systems owned and operated by Pipeline Intervenors is shown on the maps attached as Appendices H and I to FPC Pet. at pp. 93a and 94a.

River. United Gas Pipe Line Company (United) is a major supplier of gas to each of the Pipeline Intervenors. Because it did not have sufficient supplies of gas to meet the requirements of all of its customers, United began, on November 1, 1970, curtailing deliveries to Pipeline Intervenors and to its other customers, including direct industrial customers such as Lousiana Power & Light Company (LP&L). As the nationwide gas shortage worsened, United found it necessary to impose increasingly greater curtailments on its customers. Thus, during the winter of 1971-72, United estimates that it may be required to curtail deliveries by as much as 1.5 billion cubic feet on extremely cold days.[5]

These curtailments by United have compounded the gas shortage faced by each of the Pipeline Intervenors and accordingly they have found it necessary to institute curtailment programs of their own in accordance with provisions of their tariffs filed with the Commission. Of course, if United is required to supply the full requirements of LP&L and its other industrial customers, then the level of curtailment of deliveries to Pipeline Intervenors by United and by Pipeline Intervenors to the millions of customers they serve will necessarily be dramatically increased.

Pipeline Intervenors actively participated as intervenors in proceedings before the Federal Power Commission involving curtailment plans filed by United and they have been allowed to intervene in the court

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[5] On February 14, 1972, United advised all of its customers that its estimated curtailments during the summer of 1972 (April 1-October 31) would total approximately 221.3 billion cubic feet or an average of 1.034 billion cubic feet per day.

below in the so-called "Curtailment Proceeding".[6] Although Pipeline Intervenors would clearly be adversely affected by the relief which LP&L seeks in the so-called "Collateral Proceeding", they were not joined as parties to that proceeding. However, their position as intervenors in the "Curtailment Proceeding" gives them standing to file this brief.[7]

REASONS FOR GRANTING THE WRIT

1. The instant petitions raise what is undoubtedly the most important issue as to the scope of the Commission's jurisdiction under the Natural Gas Act since this Court's landmark decision[8] holding that the Commission had jurisdiction over sales of natural gas by producers to interstate pipelines. By itself, the question of whether the Commission has the statutory power in times of a gas shortage to allocate all supplies of gas transported by an interstate pipeline, including gas transported for delivery to direct industrial customers, is of fundamental importance to sound administration of the Natural Gas Act. But when considered in the context of the present day gas shortage, this

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[6] By order of Judge Coleman issued January 11, 1972 each of the Pipeline Intervenors was permitted to intervene in the lead case (*Louisiana Power & Light Co., et al.* v. *Federal Power Commission*, No. 71-3429) seeking review of the Commission's orders in the Curtailment Proceeding.

[7] See paragraph 6 of Rule 21 of the Rules of the Supreme Court. Texas Eastern Transmission Corporation also sought permission of the parties to file an *amicus curiae* brief in the "Collateral Proceeding". As indicated by letters contemporaneously filed with the Clerk, the consent of the Federal Power Commission and United has been obtained. No response was received from LP&L and Texas Eastern can only assume it does not consent.

[8] *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672 (1954).

question has immediate and far reaching practical ramifications as to the volumes of gas which will be available to meet the requirement of millions of domestic consumers. As the Commission's petition points out (FPC Pet. at p. 15), the decision of the court below may result in as much as 1,683,000 thousand cubic feet (Mcf) per day being taken away from pipeline and distribution company customers of United, so that United's direct industrial customers can enjoy their full contract volumes without curtailment. The adverse effect of such a situation is dramatically demonstrated by the fact that these resale customers of United can only absorb curtailments of 650,000 Mcf per day without jeopardizing deliveries to homes, schools, hospitals, etc. (Ex. 121, R. 6406). Moreover, the full nationwide impact on resale consumers is much worse because the decision below is not limited to deliveries to LP&L or to United's direct industrial customers but would remove all direct industrial customers of all interstate pipelines from Commission curtailment jurisdiction.[9]

2. The decision below creates an unwarranted and unnecessary "gap" in the "complete, permanent and effective bond of protection" which this Court time and again has said was provided for ultimate con-

[9] Thus, Judge Clark's opinion states (FPC Pet. at p. 22a):

> "Summarizing, we hold that the FPC has no form of continuing certificate jurisdiction over direct sales to customers of interstate pipeline companies. It has the initial right to issue or veto a certificate of public convenience and necessity and it must give its approval to the abandonment of the use of the certificated facilities, but between the two functions the express exemption of regulatory power over such consumptive sales bars agency intervention."

sumers [10] by the Natural Gas Act. According to Judge Clark's opinion, once the Commission issues an interstate pipeline a certificate under Section 7(c) (15 U.S.C. 717f(c)) with respect to the transportation of gas for delivery to a direct industrial customer, it is powerless to exercise any further jurisdiction over such transportation until abandonment is sought pursuant to Section 7(b) (15 U.S.C. 717f(b)). This "power gap" appears to be based on the fact that the Commission does not have rate jurisdiction over the sale of gas to direct industrial customers because Section 1(b) (15 U.S.C. 717(b)) limits its jurisdiction to "sales for resale", i.e., sales by a pipeline to its distributor and pipeline customers which resell the gas to ultimate consumers. However, the Commission's curtailment jurisdiction does not depend upon its jurisdiction over the *sale* of gas but is derived from the jurisdiction granted by Section 1(b) over the *transportation* of gas by interstate pipelines. Thus, in *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana*, 332 U.S. 507, 523 (1947), this Court pointed out that curtailment of service to direct sales customers is a matter "largely related * * * to transportation and thus within the jurisdiction of the Federal Power Commission to control * * *". Moreover, the Commission's transportation jurisdiction applies to all gas transported in interstate commerce

[10] By "ultimate consumers" we do not believe that the Court necessarily had in mind any particular class or classes of consumers. We would note, however, that the large industrial users and electric generating companies, such as LP&L, who buy large volumes of gas from pipelines such as United in many instances have alternative fuel capabilities which can be used to minimize the consequences of curtailment. Such alternate capabilities are, for all practical purposes, unavailable to the millions of residential and small commercial consumers of gas.

and not just to that portion of the gas over which the Commission also has rate jurisdiction.[11]

Because of its failure to recognize the dichotomy between the Commission's jurisdiction over sales for resale of gas and its jurisdiction over the transportation of gas, the court below would require residential and small commercial consumers to bear the brunt of curtailment by interstate pipelines so that direct industrial customers of such pipelines can continue to receive their full requirements. It is simply contrary to common sense to think that Congress intended to give direct industrial customers such preferential status. We do not believe that a comprehensive scheme of legislation that was intended to protect all consumers literally leaves all but one class of consumers out in the cold when a shortage of gas requires curtailments by an interstate pipeline. Instead, we believe that the Commission's extensive powers over the transportation of all interstate gas under Sections 4, 5 and 16 of the Natural Gas Act (15 U.S.C. §§ 717(c), 717(d), and 717(o)) authorize it to effect an equitable allocation of available natural gas supplies among all customers of an interstate pipeline in times of gas shortage.

Finally, we would note that the Fifth Circuit set up something of a strawman when it framed the issue in terms of (FPC Pet. at 2a):

> ". . . whether the grant of transportation jurisdiction confers a power to the FPC to now recon-

[11] The Fifth Circuit's holding that only a part of the entire stream of gas being transported by an interstate pipeline is subject to Commission curtailment jurisdiction is inconsistent with the decision in *California* v. *LoVaca Gathering Co.*, 379 U.S. 366 (1965), where this Court held that the entire stream of gas transported was subject to Commission jurisdiction despite the fact that it did not have jurisdiction over the sales related to a certain volume of the gas.

dition certificates of public convenience and necessity it previously issued authorizing the construction and use of pipeline facilities to perform gas sales contracts between an interstate gas pipeline, United Gas Pipeline Company (United), and a utility company, Louisiana Power & Light Company (LP&L), which burns the contract gas under its boilers to generate electricity."

However, the Commission's jurisdiction over curtailment of deliveries to direct industrial customers does not involve the reconditioning of permanent certificates of public convenience and necessity previously issued to United to make direct sales to such industrial customers.[12] No question of the Commission's certificate power under Section 7 is involved. As set forth above, what is involved is the exercise by the Commission of its powers under Sections 4, 5 and 16 of the Act to prevent undue discrimination or preferential treatment with respect to the transportation of interstate gas over which the Commission was granted jurisdiction by Section 1(b).

3. We would also note our concurrence in the challenge made in the petitions to the holding of the court below that the Commission has no certificate jurisdiction with respect to that portion of United's pipeline system used to supply gas to LP&L's Nine-Mile Point generating plant.[13] While we think the Fifth Circuit erred in its substantive determination that these facili-

[12] To the extent that the Fifth Circuit felt that the Commission was powerless to reduce the volumes specified in the certificates issued to United with respect to its direct sales to LP&L, we would note that the Commission likewise permanently certificated the volumes which United is to deliver to its jurisdictional customers such as Pipeline Intervenors.

[13] LP&L's Sterlington Plant is supplied through facilities which are admittedly jurisdictional, having been previously certificated by the Commission.

ties were nonjurisdictional despite the commingling of gas from intrastate and interstate sources,[14] the Court need not reach that question because the initial determination of this question should have been made by the Commission—subject to judicial review by direct appeal pursuant to Section 19 of the Natural Gas Act (15 U.S.C. § 717r)—in proceedings recently concluded.[15] *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

4. Another reason that the Fifth Circuit's decision should be reviewed and reversed, and one that can and should be raised by this Court on its own motion,[16] is

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[14] The nonjurisdictional result reached by the court below would appear to be clearly in conflict with the decisions of this Court in *Federal Power Commission* v. *Florida Power & Light Co.*, 40 U.S.L. Week 4141 (January 12, 1972) and *Connecticut Light & Power Co.* v. *Federal Power Commission*, 342 U.S. 515 (1945).

[15] On February 9, 1972, the Commission issued Opinion 610, *United Gas Pipe Line Co.*, Docket No. CP71-89, holding that it had jurisdiction over the facilities and sales made through them. The time (30 days) for filing rehearing of this order has not yet expired. Therefore, as United points out, Opinion 610 is not yet ripe for review by this Court.

[16] The duty of a court to raise a question of indispensable parties of its own motion is well settled. In *Hoe, et al.* v. *Wilson*, 9 Wall. 501, 19 L.Ed. 762 (1869), Justice Swayne said (9 Wall. at 503, 504, 19 L.Ed. 763):

> "But Zephania Jones, the complainant in the suit in which the decree of sale was made, and the other heirs-at-law of Ann R. Dermott, are indispensable parties. No relief can be given in the case before us which will not seriously and permanently affect their rights and interests. According to the settled rules of equity jurisprudence the case cannot proceed without their presence before the court. The objection was not taken by the defendant, but the court should, *sua sponte*, have caused the bill to be properly amended, or have dismissed it, if the amendment were not made. Instead of this being done the cause was heard and decided upon its merits. This was manifest error."

the fact that such decision, as was the District Court's, was rendered without the joinder of indispensable and necessary parties in accordance with Rule 19(a) of the Federal Rules of Civil Procedure, 28 U.S.C. Rule 19(a).[17] For example, Pipeline Intervenors and many of United's other customers are subject to the service of process by the District Court where LP&L's complaint was filed and their joinder would not deprive the court of jurisdiction over the subject matter of the action.[18] Moreover, Pipeline Intervenors and such other customers will be directly hurt if the injunctive relief sought by LP&L is granted since United will be required to increase its curtailments in order to supply the full volumes of gas required by LP&L. Therefore the presence before the court of Pipeline Intervenors and these other customers of United was absolutely, not conditionally, necessary. *California* v. *Southern Pac. Co.*, 157 U.S. 229 (1894); *State of Texas* v. *Interstate Commerce Commission*, 258 U.S. 158 (1922); *Baltimore and Ohio Railroad Co.* v. *City of Parkersburg*, 268 U.S. 35 (1925); [*Moore's*] *Federal Practice*, Vol. 3A, §§ 19.02, 19.07 (2d ed., 1970). As far back as *Mallow, et al.* v. *Hinde*, 12 Wheat. 193, 198, 6 L. Ed. 599, 600 (1827), this Court recognized that no court can directly adjudicate upon a person's rights without such person being actually or constructively before it. The necessity of the joinder of Pipeline Intervenors and the other of United's customers which are subject to the jurisdiction of the District Court in Louisiana

[17] Rule 19(a) as printed in Appendix A hereto.

[18] The pipeline systems owned and operated by each of the Pipeline Intervenors extend through South Louisiana. See FPC Pet. at p. 93a. Moreover, the state of incorporation of LP&L is Florida, while each the Pipeline Intervenors is incorporated in the State of Delaware.

simply shows why Congress gave the Federal Power Commission curtailment jurisdiction over all gas transported in interstate commerce by an interstate pipeline.

CONCLUSION

For the foregoing reasons, Pipeline Intervenors urge the Court to grant the petitions for writs of certiorari sought by the Commission and by United. As noted at the outset, we believe that expedited consideration of these petitions is in the public interest.

Respectfully submitted,

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APPENDIX A

Rule 19(a) of the Federal Rules of Civil Procedure, 28 U.S.C. Rule 19(a), provides in pertinent part:

> "(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action."

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(FPC Opinion 606)

MOTION THAT THE COURT EN BANC CONSIDER THE PETITIONS FOR WRITS OF CERTIORARI TO REVIEW OPINIONS OF THE FEDERAL POWER COMMISSION

AND

MEMORANDUM UPON BEHALF OF RESPONDENTS MOBILE GAS SERVICE CORPORATION, ET AL., IN RESPONSE TO PETITIONS FOR WRITS OF CERTIORARI AND IN SUPPORT OF MOTION FOR EN BANC CONSIDERATION

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